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# Articles

## The Power Of Congress “Without Limitation” In The Twenty-First Century

Peter A. Appel\*

In a recent article, I examined the sources and limitations of a clause of the federal Constitution—namely the Property Clause—which has largely escaped notice by academics.<sup>1</sup> The Property Clause straightforwardly grants Congress the “Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States”<sup>2</sup> This language clearly grants Congress some power, but it does not answer the question: how much? The crude answer is: a lot. The Supreme Court’s classic description of the federal government’s power under this clause comes from *United States v. City of San Francisco*, in which the Court held that it is a grant of power “without limitation.”<sup>3</sup> The notion that the federal government has a power, any power, that is without limitation is shocking, especially in the current milieu in which the Supreme Court is revisiting all of the limitations on congressional power. Surely the power that Congress has over the property of the United States has limitations: Congress could not enact a statute allowing grazing on public lands, but deny it to people who vote Republican or profess Catholicism. Nevertheless, with one notable example,<sup>4</sup> the Court has upheld congressional exercises of this power.

The story of how I became interested in this subject may prove instructive for how extensive this power might be. When I was an attorney at the United States Department of Justice, I had a case involving the Sylvania Wilderness Area in Michigan. Congress had subjected the wilderness area to all of the usual restrictions of the Wilderness Act, and the Forest Service went about prohibiting motorized and mechanized uses in the Sylvania. Private landowners who lived on the shore of a lake that lies partially in-

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\* Associate Professor, University of Georgia School of Law. This article is a rough and annotated transcript of remarks given on March 15, 2003, at the 26<sup>th</sup> Annual Public Land & Resources Conference held at the University of Montana School of Law. Many thanks to the organizers of the Conference and those who asked thoughtful questions. These remarks are dedicated to the memory of Ann. S. Almy (1947-1997) who, as one of my supervisors at the United States Department of Justice, instilled in me a deep affection for the intricacies and oddities of public lands law. As always, much love to Christine Loren Albright.

1. Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 Minn. L. Rev. 1 (2001).

2. U.S. Const. art. IV, § 3, cl. 2.

3. 310 U.S. 16, 29 (1940).

4. *Scott v. Sandford*, 60 U.S. 393 (1856).

side, and partially outside the wilderness area objected to the new regulations. The landowners claimed the federal government had no power to regulate their use of the lake because they possessed a riparian right (actually, it was technically a littoral right) to navigate the surface of the lake, and that the federal government lacked constitutional authority to regulate these private interests based on their potential impacts on federal property.<sup>5</sup> In researching this point, I ran across cases that held that the federal government's power over its own property was "without limitation."<sup>6</sup> How far did it go, I wondered.

My answer came several years later and ended up taking one hundred and thirty pages in a law review, but the bottom line was straightforward: the Property Clause vests Congress with plenary authority to regulate public property, and also with the authority to regulate activities off federal lands that affect federal lands. Congress' power over activities occurring on public property is at least as great as the spending power. With regard to federal regulation of activities off federal lands that affect federal lands, the power of Congress is like the power that Congress has over interstate commerce, specifically, the power that Congress has to regulate intrastate activities that substantially affect interstate commerce.

Interest in the Property Clause is surprisingly thin. Despite the language from the Supreme Court—postulating a power that Congress has that is "without limitation"—the Property Clause has largely escaped scholarly attention. Perhaps the easiest way to see this phenomenon is to examine Laurence Tribe's treatise on constitutional law, in which his discussion of the power that the federal government has over its lands is lumped into the same section as the power that Congress has to establish uniform rules for bankruptcies.<sup>7</sup> Professor Tribe is not alone among academics. I suspect that

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5. *Stupak-Thrall v. U.S.*, 89 F.3d 1269 (6<sup>th</sup> Cir. 1996). The court was actually divided on the ultimate outcome of the case, but both the concurring judges and the dissenting judges agreed that Congress had the power to enact the regulations at issue and could have delegated that power to the land management agency. See *id.* at 1269-72 (Moore, J., concurring); *id.* at 1277 (Boggs, J., dissenting)(acknowledging that the federal government has the power to regulate private activities under the Property Clause).

6. *U.S. v. City of San Francisco*, 310 U.S. 16, 29 (1940); see also *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404-405 (1917); *Light v. U.S.*, 220 U.S. 523, 536 (1911); *Gibson v. Chouteau*, 80 U.S. 92, 99 (1871); *United States v. Gratiot*, 39 U.S. 526, 537-38 (1840).

7. Laurence H. Tribe, *American Constitutional Law* § 5-8, 848-50 (3d ed., Found. Press 2000). This organizational decision may prove unfortunate, but not because of developments in Property Clause jurisprudence. Recently, the Sixth Circuit, splitting with the others who have decided the issue, has held that the power Congress has to establish uniform rules for bankruptcies grants Congress the power to waive the sovereign immunity of the states in bankruptcy proceedings. *Hood v. Tenn. Student Assistance Corp.*, 319 F.3d 755 (6<sup>th</sup> Cir. 2003), cert. granted, 124 S. Ct. 45 (2003). The Sixth Circuit relied heavily on the specific treatment of the bankruptcy clause in the *Federalist Papers* to support its holding. *Id.* at 764-67. The *Federalist Papers* that pertain to the Property Clause do not contain similar language, and instances of attempts to waive the sovereign immunity of the states under the Property Clause are nonexistent so far as I know. If the Supreme Court affirms the Sixth Circuit, Professor Tribe may want to separate the two clauses in future editions.

the grant of power that Congress has over the property of the United States at first strikes most people—especially most people in the eastern part of the United States—as a mere housekeeping provision of the Constitution. Of course Congress has the power over the property of the United States; if it did not have that power in the Constitution, it would have to invent it. Of course, these Easterners do not appreciate the presence of the federal government in the West, where over a quarter of Montana, for example, is owned in fee by the federal government, not including lands that the United States holds in trust for Indian tribes or individual Indians. Ask your average Easterner about how much land the federal government owns in this country and she or he will be astonished to hear that it is currently almost thirty percent of the entire United States.<sup>8</sup> When Easterners think of federally owned land, they think of the local federal building, and maybe of Yosemite or the Grand Canyon.

To the extent that scholars discuss the Property Clause, they frequently focus on the power of Congress over the territories, such as Puerto Rico, the Virgin Islands, Guam, American Samoa,<sup>9</sup> or the similar power that Congress exercises over the District of Columbia.<sup>10</sup> To the extent that scholars have focused on the property aspects of the Property Clause itself, the scholarship has been divided into two camps. The first camp contains those who believe that the Property Clause is a second-class grant of power to Congress, one that has essential limitations contained within it, and that it grants to Congress only the powers that an ordinary proprietor would have over her or his lands. The federal government has no more powers as a result of this clause than a private citizen unless the federal government acts to further an enumerated power.<sup>11</sup> The second camp includes those who

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8. These statistics are for fiscal year 1999, and are derived from Bureau of Land Mgt., U.S. Dept. of the Interior, Public Land Statistics tbl. 1-3 (2000). More recent editions of this publication do not include the convenient breakdowns of percentages of land owned by the United States in the different states.

9. See e.g., Sanford Levinson, *Why the Canon Should Be Expanded to Include The Insular Cases and the Saga of American Expansionism*, 17 Const. Comment. 241 (2000); Robert A. Katz, Student Author, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. Chi. L. Rev. 779 (1992).

10. A separate clause of the Constitution grants to Congress the power to exercise "exclusive legislation" for the District of Columbia and other federal enclaves. See U.S. Const. art. 1, § 8, cl. 17; see also Appel, *supra* n. 1, at 4 n.15 (distinguishing Property Clause from Enclave Clause). The scholarship over the District of Columbia itself frequently focuses on the fact that the District lacks representation in Congress and whether the District should be—or for that matter could be—made a state. See e.g., Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160 (1991); Symposium, *Is There a Constitutional Right to Vote and Be Represented? The Case of the District of Columbia*, 48 Am. U. L. Rev. 589 (1999).

11. The most comprehensive statement of this view is found in David E. Engdahl, *State and Federal Power over Federal Property*, 18 Ariz. L. Rev. 283 (1976), but other modern commentators expressing this view include Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 Pac. L. J. 693 (1981); Ronald F. Frank & John H. Eckhard, *Power of Congress Under The Property Clause to Give Extraterritorial Effect to Federal Lands Law: Will "Respecting Property" Go the Way of "Affecting Commerce"?*, 15 Nat. Resources Law. 663 (1983); Carolyn M Landever, *Whose Home on the Range? Equal Footing, the New Federal-*

believe that the Property Clause grants to Congress all of the powers of a sovereign over its lands, not merely the power of a proprietor. This camp takes the Court at its word that congressional power under the Property Clause is "without limitation" but it has failed to find a satisfactory limit on that power.<sup>12</sup>

My earlier work accomplished two ends. First, it set forth a positive historical account of what the Framers meant when they wrote the Property Clause, and concluded that they wanted Congress to have broad power over these lands. The second part then examined what possible limits exist on the Property Clause. In that part, I concluded that the Property Clause itself contained few limitations on congressional power, and that the most salient restrictions on congressional power were external limitations, namely the Bill of Rights, principles of federalism, and other provisions of the Constitution.<sup>13</sup> That work was the beginning of my endeavors in this area.

In this article, I would like to accomplish two goals. First, I would like to retrace briefly the historical background of the Property Clause, and what led to my conclusions about it. Then, I would like to look at what implications my arguments have for public lands administration and for future scholarship. Two implications occur to me immediately in considering the governance of public property. First, I claim that congressional power under the Property Clause is very broad. What implications does this have for the management of public lands, and specifically, public property in light of the events of September 11, 2001 and the war on terrorism? Could new restrictive legislation flow from my earlier views? Second, the power granted in the Property Clause is a power granted to Congress, not to the President. Nevertheless, the Executive Branch obviously plays a great role in setting land management policies for federally owned property. Can troubling problems stem from this arrangement and the potential for the Executive Branch to overreach? Finally, in a radical twist from these two public policy issues, I would like to examine on the periphery an academic question and propose a scholarly agenda for the academic community. One of the underlying issues that arises in Property Clause cases is the treatment of disadvantaged groups. Interpretations of the Property Clause have hurt—in no particular order—African Americans, Indians, Mormons, and members

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*ism and State Jurisdiction on Public Lands*, 47 Fla. L. Rev. 557 (1995); and Louis Touton, Student Author, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 Colum. L. Rev. 817 (1980).

12. Those taking this view include: Harry R. Bader, *Not So Helpless: Application of the U.S. Constitution Property Clause to Protect Federal Parklands from External Threats*, 39 Nat. Resources J. 193, 201-05 (1999); Eugene R. Gaetke, *The Boundary Waters Canoe Area Wilderness Act of 1978: Regulating Nonfederal Property under the Property Clause*, 60 Or. L. Rev. 157, 167-69 (1981); Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 Mich. L. Rev. 239, 250-55 (1976); James J. Vinch, *The Telecommunications Act of 1996 and Viewshed Protection for the National Scenic Trails*, 15 J. Land Use & Envtl. L. 93, 126-30 (1999).

13. See generally, Appel, *supra* n 1.

of old economies, and there seems to be at least a small correlation between fights over public property and fights for the rights of otherwise disadvantaged groups. I will present the evidence that I have assembled, and I hope that I might inspire others to join me in exploring the nuances of these battles.

In outlining this project, I will take the role of an outsider to some of the public land controversies of the West. Too many people have ceded the battlefield about federal control over federal property to the West, because they think that it involves the management of lands technically classified as public lands. Public land issues do not typically engage us in regions outside of the West. Those in the East who do not care about public lands thus forget about the implications of federal property ownership in their states and localities. What the federal government can do in Montana to protect the Bitterroot National Forest it can surely do in Georgia to protect the Chattahoochee-Oconee National Forests. By implication, the federal government can take similar steps to protect the federal buildings in Atlanta, or for that matter, the small federal building in Athens, Georgia, or the small post offices scattered throughout the country. The lack of scholarly attention to the power of the federal government over its property has led to a paucity of debate over these questions, and the debate has mostly included people from the West who would rather not have the federal government involved in what they regard as their affairs. To remedy this problem in a small respect, I will address my remarks to the power of the federal government over federal property, and not its power over the narrower legal category of public lands. Obviously, this is a public lands conference, and my comments extend to the vast acreage known as the public lands. Nevertheless, I wish to reach a wider audience in the hope they will think about the physical presence of the federal government in every community in the same way that people in Montana and the other western states do.

## I.

To understand the origins of the Property Clause, it is useful to recall how the United States ended up owning as much land as it does.<sup>14</sup> This history, for now, ignores the prior occupants of those lands, namely the Indians. I will return to them later.

After the Revolution, some of the thirteen original states held or claimed lands outside of their original boundaries. The Articles of Confederation did not address these lands, nor did it address any property that the United States might own. After all, the Articles formed a weak government, and the only property that the United States might own as a collective would be warships or artillery. The lands, however, caused a great deal of controversy among the states. The states without western lands were jealous of

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14. Much of the following discussion is a summary of Appel, *supra* n. 1, at 10-78.

their landed counterparts because those states would have something to sell in order to pay off their war debt. These states insisted that the landed states cede their lands to the United States as a whole so that the federal government could finance the war by selling the lands. Maryland was steadfast in its objection and refused to ratify the Articles of Confederation for just this reason. Indeed, it was only when Virginia agreed to cede its lands that Maryland acquiesced.<sup>15</sup>

Nevertheless, the Articles did not empower the United States to govern or manage these lands. That lack of power did not prevent Congress from enacting the Northwest Ordinance in 1787, which Congress reenacted as one of its first pieces of legislation upon ratification of the Constitution. And the common understanding was that these lands were ceded to the United States to form a trust to further the interests of the nation as a whole.<sup>16</sup>

During the Constitutional Convention, the Property Clause was not extensively debated, although everyone acknowledged the need for such a clause. Gouverneur Morris drafted the original language and the clause entered the Constitution with little dissent. Only Maryland voted against adding the clause to the Constitution, although I have never quite understood why. The *Federalist Papers* have a very brief treatment of the clause, focusing primarily on the need for a constitution that would create a more powerful national government. Madison argued that Congress had enacted the Northwest Ordinance without the least bit of authority from the Articles of Confederation. This tendency to seize power where the founding document did not grant it was a bad one, and it would be better, Madison urged, to grant Congress the power expressly rather than have it assume power. Although the Northwest Ordinance was acceptable in substance to Madison, one could not be confident that Congress would stop there.<sup>17</sup>

The early cases and commentary interpreting the Property Clause all hold that Congress has broad authority to manage the "Territory and other Property belonging to the United States."<sup>18</sup> In *American Insurance Co. v. 356 Bales of Cotton*, the Court held that Congress could create non-Article III territorial courts and vest them with admiralty jurisdiction.<sup>19</sup> In *United States v. Gratiot*, the Court held that the power of Congress to dispose of its lands included the power to lease the lands for mineral development, concluding that Congress did not need to dispose of lands through sale alone but could retain them in a state even if Congress admitted the state to the Union.<sup>20</sup> Early commentary on the Constitution reinforced this view. Joseph

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15. *Id.* at 19-23.

16. *Id.* at 29.

17. *Id.* at 28.

18. U.S. Const. art. IV, § 3, cl. 2.

19. *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828). Also referred to as *American Insurance Company v. Canter*.

20. *United States v. Gratiot*, 39 U.S. 526 (1840).

Story wrote in his *Commentaries* that the power of Congress to govern the territories and federal property would probably exist if even if it were not in the Constitution, and he stated that "the power of Congress over the public territory is clearly exclusive and universal; and their legislation is subject to no control; but is absolute."<sup>21</sup>

This general trend of treating the Property Clause as a broad grant of power continues until the Supreme Court's decision in the *Dred Scott* case,<sup>22</sup> which is the only decision of the Supreme Court that definitely treats the Property Clause narrowly. *Dred Scott* is the embarrassment of the American legal system, a "lie before God," according to Frederick Douglass.<sup>23</sup> It is like a naughty word that polite people don't mention, except to tar and feather a point they strenuously disagree with.

Most people don't read *Dred Scott* these days, which is understandable. The decision is extremely long, extremely wrong, and poorly written. But curiously it has often escaped the direct attention of those people who actually comment on the Property Clause. Here is how the issue arose in *Scott*: Scott's master had taken Scott from Missouri, which was a slave state, into Illinois, which was a free state, and also into the territory of the United States in what is now Minnesota, where slavery had been banned under the Missouri Compromise. Scott argued that his presence in the free territory rendered him free. Chief Justice Taney rejected this argument. In doing so, he determined that Congress did not have plenary authority over the territories but only over those lands that were ceded to the United States prior to the ratification of the Constitution. The term property in the same clause applied only to the personal property—those warships and artillery I mentioned earlier—of the United States, not real property.

Like most of everything else that Taney postulates in his opinion, this is simply preposterous. Taney's decision would hold the Louisiana Purchase was unconstitutional, that *American Insurance Co. v. Canter* is wrong, that the United States cannot acquire property within a state, or any property for that matter, and that it cannot govern it. Even one of the concurring justices recognized this. In his opinion, Justice Catron wrote that he could not accept that the federal government could not legislate for the territories.

It is due to myself to say, that it is asking much of a judge, who has for nearly twenty years been exercising jurisdiction, from the western Missouri line to the Rocky Moun-

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21. Joseph Story, *Commentaries on the Constitution of the United States*, vol. 3, § 1318, 198 (Da Capo Press 1970)(1833).

22. *Sandford*, 60 U.S. 393.

23. Frederick Douglass, Address, Colored Men's Rights in this Republic: (New York, N.Y., May 14, 1857), in *The Fredrick Douglas Papers: Series One: Speeches, Debates, and Interviews, 1855-63*, vol. 3, 147 (John W. Blassingame ed., Yale U. Press 1985). I did not find this quotation through my own research and am indebted to Mark Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 Const. Comment. 271, 272 (1997).



tains, and, on this understanding of the Constitution, inflicting the extreme penalty of death for crimes committed where the direct legislation of Congress was the only rule, to agree that he had all the while been acting in mistake, and as an usurper.<sup>24</sup>

To be sure, this Southerner ended up voting for the result in *Dred Scott*, but he saw the obvious flaws of Justice Taney's reasoning.

Needless to say, *Dred Scott* did not last long. The first post—Civil War cases of the Court dealing with the Property Clause that address the power of Congress over the territories and other property belonging to the United States assume that it is an inherent power of the United States.<sup>25</sup> Indeed, this inherent power theory was Taney's account in *Dred Scott* for what power the United States had over the public lands. Eventually, the Court came around to declaring that the power the federal government has over the territories and other property comes from the Property Clause and that it is broad. That power includes the ability to act in contravention of otherwise applicable state law. For example, in *Hunt v. United States*, the Supreme Court upheld the Forest Service's decision to shoot deer in a national forest because there were too many of them even though the hunting violated state law.<sup>26</sup> In *United States v. City of San Francisco*, the Court upheld a condition on a grant of land from the United States to a municipality.<sup>27</sup>

The most interesting applications of the Property Clause in this era involved regulation of conduct taking place off federal lands that nevertheless affected federal lands. The first of these important cases was *Camfield v. United States*.<sup>28</sup> This case is much easier to understand if you see the diagram from the Court's opinion:

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24. *Sandford*, 60 U.S. at 522-23.

25. See Appel, *supra* n. 1, at 10-78.

26. *Hunt v. US.*, 278 U.S. 96, 100-101 (1928).

27. *City of San Francisco*, 310 U.S. at 29-31.

28. 167 U.S. 518 (1897).

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7	8	9	10	11	12
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30	29	28	27	26	25
31	32	33	34	35	36

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In *Camfield*, a private person erected fences on privately—owned land (the odd-numbered sections in the diagram) in such a way that he fenced in about twenty thousand acres of public land. Congress had enacted a statute against fencing in the public lands. The dotted lines in the diagram show where Camfield had erected the fences. By erecting the fences only on the odd-numbered sections in the township, Camfield managed to fence an entire township without actually placing a fence on land owned by the United States. Camfield had two defenses to the federal government's bill in equity seeking to enjoin the fences. First, as a matter of fact, he argued that he had not placed any of the fencing on public land and therefore could not be guilty of violating the statute. Second, Camfield argued that Congress lacked authority over the public lands once the lands were part of a state admitted to the Union. As an ordinary proprietor, the federal government could sue to abate nuisance, but there was no evidence that these fences were nuisances. The Court could have gone two ways. It could have written a narrow opinion holding either that Camfield had, as a matter of

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29. *Id.* at 521.

fact, effectively fenced public lands or that the fences were nuisances and left it at that.

Instead, the Court wrote a broad opinion. It held that Congress retains its plenary authority over public lands even after statehood.<sup>30</sup> More remarkably, it held that "[t]he federal government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case."<sup>31</sup> It also held that the federal government's power extended beyond controlling nuisances, which an ordinary proprietor could do through a suit for abatement.<sup>32</sup> The federal government could abate problems through legislation of general application and was not limited to those problems that would constitute common law nuisances.

In a similar case, *United States v. Alford*, the Court faced a question of regulating private activity that potentially harmed federal lands.<sup>33</sup> Congress had enacted a statute prohibiting, under pain of criminal sanction, setting fires that imperil public lands. Someone set such a fire on private lands and was convicted under the statute. The district court dismissed the indictment, and the Supreme Court reversed in an opinion that was shorter than the syllabus and argument of counsel.

The Court's most recent opinion interpreting the reach of the Property Clause was *Kleppe v. New Mexico*, which upheld the constitutionality of the Wild Free-Roaming Horses and Burros Act.<sup>34</sup> In that act, Congress declared the presence of these animals was important for public range management, and Congress prohibited anyone from rounding up the horses and burros, and harming or harassing them. The horses and burros were causing a problem on a range allotment in New Mexico, and after the Bureau of Land Management did nothing to remove the animals the ranchers asked the State of New Mexico to do so under the New Mexico Estray Act. The Court upheld the federal act under the Property Clause even though the horses and burros themselves were not declared the property of the United States.<sup>35</sup> Instead the desire of Congress to preserve these animals on its lands justified Congress in enacting the statute.

Putting all of these cases together yields a few conclusions. Congress certainly has broad power to control activities that take place on federal property.<sup>36</sup> The more interesting question is the scope of extraterritorial

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30. *Id.* at 525-26.

31. *Id.* at 525.

32. *Id.*

33. 274 U.S. 264 (1927).

34. 426 U.S. 529 (1976).

35. *Id.* at 540.

36. A recent student note reaches the unremarkable conclusion that the Archeological Resources Protection Act of 1979 (ARPA)—which regulates taking archeological resources from public lands—is valid Property Clause legislation. See Uri A. Jurist, Student Author, *Wild Burros, Fences, and ARPA: Viewing the Archeological Resources Protection Act as Property Clause Legislation*, 5 U. Pa. J. Const. L. 109 (2002). I say that the conclusion is unremarkable because I believe that Congress has indisput-

federal power. If Congress can regulate activities off federal property to protect federal property, as the Court held in *Camfield* and *Alford*, and if Congress can declare certain things desirable on federal lands and protect them as the Court held in *Kleppe*, then Congress has the power to legislate activities off federal property to protect desirable aspects of federal lands. Although the Supreme Court has suggested recently that local land use control probably lies beyond congressional power under the Commerce Clause,<sup>37</sup> Congress may have this power where federal property is implicated. Thus, Congress could prohibit someone from filling a wholly intra-state wetland that was unconnected to a navigable waterway if it did so to prevent harm to federal property. Congress could protect an endangered species on private property to allow that species to recover so that the species could return to public property.<sup>38</sup> Congress could also prohibit carrying a firearm or other weapons within a certain distance of federal property.

Are there any limitations on this power that the Court has described as being "without limitation"? Surely there must be, and they take two forms. First, Congress can only legislate if it determines that a particular activity will affect the property of the United States. Obviously, any activity that takes place on federal lands will affect them. For activities off federal lands, I have argued that the power of Congress is like its power to regulate intra-state activities under its power to regulate interstate commerce. If activity off federal lands, when aggregated, substantially affects federal lands, Congress can regulate it under the Property Clause. Second, other limitations on the federal government's such as the Bill of Rights and other restrictions in the Constitution, limit what Congress can do under the Property Clause. Thus, Congress could not establish a church on public land or subject offenders of public law to cruel and unusual punishment.

One right established in the Bill of Rights that would not limit the discretion of Congress acting pursuant to the Property Clause is the Takings Clause of the Fifth Amendment.<sup>39</sup> That clause requires just compensation when the government has taken private property for public use. When the federal government has taken private property it can usually be sued in the

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able authority to regulate such activities on federal land. The student also reaches the conclusion that the restrictions in ARPA that apply to Indian Lands are beyond Congress's Property Clause power. *Id.* at 126-27. For reasons that follow *infra* n. 63 and accompanying text, I disagree with that assessment.

37. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engrs.*, 531 U.S. 159, 174 (2001).

38. I made this suggestion in my earlier article. See Appel, *supra* n. 1, at 121-22. Professor Holly Doremus originally suggested that Congress could use the Property Clause in this fashion. Holly Doremus, Comment, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 Ecology L. Q. 265, 292 (1991) (arguing that under *Kleppe v. New Mexico* Congress "could justify federal protection of virtually any biological resource"). The theory also has some inkling of judicial support. See *Gibbs v. Babbitt*, 214 F.3d 483, 509 (4<sup>th</sup> Cir. 2000) (Luttig, J., dissenting) (opining that, although Congress could not protect species under the Commerce Clause, it "could plainly regulate. . . under its power over federal lands").

39. U.S. Const. amend. V. ("nor shall private property be taken for public use without just compensation"). I flag this amendment because I am frequently asked about it.

United States Court of Federal Claims, and the remedy is just compensation. The Takings Clause does not ordinarily limit the discretion of the federal government; it merely requires payment for the effects of some government activities.<sup>40</sup>

Principles of federalism may also limit what Congress can do, although the Court's cases in that area have spoken less than clearly.<sup>41</sup> Again, for activities on federal lands, principles of federalism would be at their lowest since Congress has plenary authority over its property both as proprietor and as sovereign. It would not violate our system of federalism for the federal government to designate an area as wilderness and ban motorized uses, any more than it would violate principles of federalism to allow the federal government to hunt harmful animals out of the normal state-established hunting season. Federalism principles may limit what the federal government can regulate off federal lands, but so far the law has provided little instruction on what those limitations might be. The land management agencies have had so many cases in which they disclaim the ability to manage even federal lands<sup>42</sup> that they have not pushed the question of management of private lands affecting public lands to the extent possible.

That summarizes the work I have completed to date. What remains is to predict some ways I might be right about the scope of Congress' power, but not be happy with the implications of my argument. I also wish to examine, in very different ways, some of the questions first raised by *Dred Scott*, namely the relationship between public lands (which at least one commentator has dubbed the "political lands"<sup>43</sup>) and issues of historically disadvantaged groups.

## II.

The reaction to the horrific events of September 11, 2001 has taken a number of forms. One of the most noteworthy statutes Congress enacted in the wake of those terrorist attacks is the Patriot Act. That act provides, among other things, new types of searches and wiretaps.<sup>44</sup> People who support civil liberties are generally concerned with these interferences with

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40. See *Preseault v. ICC*, 494 U.S. 1, 11-12 (1990) (holding that congressional legislation is not unconstitutional under the Fifth Amendment provided that Congress has provided a means of obtaining compensation). The Supreme Court has recently invalidated two congressional attempts to limit the devise and descent of trust lands held by individual Indians. See *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 41 U.S. 704 (1987).

41. See Appel, *supra* n. 1, at 103-18; see also Peter Appel, *Federalism in Environmental Protection*, 23 Justice Sys. J. 25, 38-40 (2002).

42. See e.g., *Alaska v. Andrus*, 591 F.2d 537, 539 (9<sup>th</sup> Cir. 1979) (Bureau of Land Management claimed originally that it lacked authority to regulate the hunting of wolves on federally-owned property); see also Sax, *supra* n. 12, at 245-50.

43. James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. Colo. L. Rev. 241, 268 (1994). Huffman, in turn, credits Richard Stroup for the phrase. *Id.* at 268 n. 149.

44. Pub. L. No. 107-56, titl. 2, 115 Stat. 272 (2001) (codified in scattered sections of 18 & 50 U.S.C.).

individual liberty, although so far the courts have largely upheld provisions of the Patriot Act and other measures taken by the federal government to fight the war against terrorism. Most of these provisions likely have their constitutional authorization in the Commerce Clause or the power of Congress over foreign affairs. What if Congress took me at my word and started enacting legislation under the Property Clause?

Assuming proper Congressional authorization, could the United States Army create a buffer zone around a military installation and insist on searching all residents that enter the area? Could the Forest Service demand, as a condition of a permit to camp in an area, that campers agree to a nightly search of their belongings? Assuming that such searches would not violate the Fourth Amendment—and the case law would indicate that these agencies could construct the searches so that they did not<sup>45</sup>—my argument implies that Congress would act constitutionally in authorizing these measures.

One might respond that these sorts of measures actually prove the limits of my argument. After all, how is a rule requiring campers to agree to a search of their belongings a needful rule or regulation respecting property belonging to the United States? Perhaps the best challenge to such a law would be the assertion that it is not a needful rule or regulation respecting property. Nevertheless, as I have argued previously, the term "needful" as used in the Property Clause deserves as much breadth in court interpretation as the term "necessary" in the Necessary and Proper Clause.<sup>46</sup> Clearly, this sort of rule that regulates conduct directly on the public lands would be a rule respecting property belonging to the United States. Thus, such a law would pass constitutional muster under my scheme.

In some ways, the only response that I have is that the Constitution empowers Congress to act foolishly if it chooses to, and the courts are empowered to overturn only those enactments which are foolish in a particular way (*e.g.*, not allowing those who profess Roman Catholicism to have grazing permits). But the answer is cold comfort in light of the things that Congress might try in the present context of the war on terrorism.

### III.

The second policy problem that my argument raises is the question: whose Property Clause is it anyway? The text of the Property Clause itself vests in Congress the power to create needful rules and regulations for the property belonging to the United States. Congress has nevertheless delegated that responsibility to the Executive Branch in a number of instances.

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45. See *e.g.*, *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002)(upholding suspicionless drug testing of students as a condition of participating in extra-curricular activity); *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990)(upholding suspicionless stop of vehicles at roadblock to curb drunk driving).

46. See Appel, *supra* n. 1, at 82.

For example, the Forest Service's Organic Act grants to the Forest Service the power to make any rules that the Forest Service sees fit for national forests.<sup>47</sup> If this grants to the Forest Service all of Congress's power under the Property Clause, and if I am correct in the reach of Congress's power, then this could vastly increase the power of the Forest Service.

At first, this approach might strike us as an acceptable proposition. The Forest Service surely will use its power for good, and not for evil. Yet other federal agencies may not be quite so kind. Apparently President Theodore Roosevelt's attitude was that because there was no law that prevented him from protecting federal lands, he therefore could do so. Many regard Teddy Roosevelt as the first great conservationist president, and if he wanted to accomplish something, it must have been good.

However, creations of power or procedures are neutral and they can be used for either good or evil. Would the people who nod with approval at Teddy Roosevelt's assumption of power be as comfortable with a similar attitude held by the present incumbent in the office of President—who, after all, like T.R. is also a member of the Republican party—taking the stance that unless the law positively prohibits him from acting that he is free to act?

The present administration has decided that public lands administration is something for the Executive Branch to exercise without extensive judicial or congressional oversight. This lack of oversight is not entirely new to this administration. For example, the Administrative Procedure Act, the first general statute creating uniform agency procedures and authorizing judicial review of administrative decisions, excludes decisions concerning public property from the requirement of notice and comment rulemaking.<sup>48</sup> Nevertheless, this administration has taken more decisions in-house and has sought to further legislation that will vest more authority in the Executive Branch without any kind of judicial scrutiny. For example, under the "Healthy Forest" initiative, the Bush Administration has sought legislation from Congress that would bypass environmental examination or judicial review for certain timber sales.<sup>49</sup> It also has announced categorical exclusions for certain projects within national forests and on Bureau of Land Management lands for "hazardous fuel restrictions."<sup>50</sup>

Even if these bills are not passed in Congress or if the administrative actions do not withstand judicial review, there are many ways in which the

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47. 16 U.S.C. § 551 (2000).

48. 5 U.S.C. § 553 (a)(2)(2000).

49. See e.g. *Wildlife Prevention and Forest Health Protection Act*, H.R. 387, 108<sup>th</sup> Cong. § 3 (2003); *Healthy Forests Restoration Act of 2003*, H.R. 1904, 108<sup>th</sup> Cong. §§ 104(b), 106, 107 (2003). The version of the bill, which was based on the earlier version of H.R. 1904, ultimately enacted scaled back on these restrictions. *Healthy Forests Restoration Act of 2003*, Pub. L. No. 108-48, §§ 104-106, 117 Stat. 1887, 1897-1900 (2003).

50. *National Environmental Policy Act Documentation Needed for Fire Management Activities*, 68 Fed. Reg. 33, 814 (June 5, 2003).

Executive Branch can speak for the United States in the management of federal property without congressional oversight or public input. An interesting example is the settlement of federal reserved water rights in the West. Reserved water rights held by the United States are surely property belonging to the United States subject to the Property Clause. What if the United States was engaged in litigation over its water rights and negotiated a settlement? This possibility is not inconsequential: Montana actively pursues such settlements, and the United States has entered into settlements for its water rights for Yellowstone National Park and Bureau of Land Management lands in Montana.<sup>51</sup> These settlements were apparently approved by the United States Departments of the Interior and of Justice and submitted to the court as a settlement of litigation, and apparently did not undergo public notice or comment. I have no problem with the substance of the settlements. But allowing the Executive Branch, on its own, to determine and dispose of the property of the United States raises some troubling implications.

The implications are troubling for two interrelated reasons. First, the courts have said that the Executive has a very wide range of discretion in creating rules for the public lands, especially when Congress has acquiesced in the exercise of Executive Branch power.<sup>52</sup> If that is the case, the power of Congress "without limitation" could become the power of the President "without limitation." Second, if the courts recognize the power of the Executive over federal property, there may be a lack of public participation and thus a lack of federal accountability in the management of public lands. This lack of oversight might extend beyond the public lands to public property generally.

#### IV.

The last area I would like to explore is how the congressional power over public lands might involve issues of discrimination against, or insensitivity towards, disadvantaged groups. The Court contracted the reach of the Property Clause to hurt one specific group, and then it expanded that power in ways that hurt other groups. For the most part, the discrimination involves discrimination against racial minorities, although history provides us with an example of discrimination against a religious minority.<sup>53</sup> This part of the article is aimed at members of the academic community who are more talented than I at putting together the pieces of evidence I have which hint at this underlying issue in public lands law. Perhaps what I perceive is smoke indicating an underlying fire.

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51. See Mont. Code Ann. §§ 85-20-101, 85-20-121 (2001).

52. *U.S. v. Midwest Oil Co.*, 236 U.S. 459, 469-73 (1915).

53. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1 (1890).



My general concern has its roots in my ruminations about *Dred Scott*. The case limited congressional power over the territories to overturn the Missouri Compromise and set the stage for slavery to be extended through the United States. In the late 1940's, the federal and state governments disputed who owned submerged lands off the coast of the United States. These lands were becoming increasingly valuable for the deposits of oil and other resources beneath them. The Supreme Court eventually sided with the federal government, and this decision elicited an outcry from the states and from some members of the academic community.<sup>54</sup> A series of articles appeared in the *Texas Law Review* during that time: one authored by three faculty members at the University of Texas; the second by Tom C. Clark, a Texan—and at the time the Attorney General of the United States; and the third by a single author from the University of Texas (who was one of the co-authors of the first piece).<sup>55</sup> The first article simply addressed federal ownership of submerged lands. Clark's article was a response to the arguments raised in the first article. The third article addressed questions of public land ownership generally. The unique history of Texas gave it special claim that it may have owned the submerged lands off its coastlines, but none of the articles addressed that question in significant detail. Moreover, the last of the series is interesting because the interest that a law professor in Texas would have in public lands would apparently be as small as one from Georgia. After all, Texas has no public lands in the traditional sense, and the percentage of its lands owned by the federal government is small.

It is the third article that has piqued my curiosity. This article cites *Dred Scott* to support its claim that the states owned federal lands, and the reference to *Dred Scott* is matter-of-fact and unapologetic.<sup>56</sup> How could this be? Of course, it could just be that the author was seeking the only judicial support for his view—any port in a storm. But one cannot help but recall that other issues were pending in Texas that were more emotional than the issue of submerged lands. The University of Texas was embroiled in a suit challenging its segregated status (which it eventually lost);<sup>57</sup> this case was one of the cases that would eventually culminate in *Brown v. Board of Education*.<sup>58</sup> President Truman had ordered the armed forces to desegregate,<sup>59</sup> a move that was unpopular in the South generally and led, in part, to Strom

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54. *U.S. v. California*, 332 U.S. 19 (1947).

55. In chronological order, the articles are: Robert E. Hardwicke, Carl Illig & C. Perry Patterson, *The Constitution and the Continental Shelf*, 26 Tex. L. Rev. 398 (1948); Tom C. Clark, *National Sovereignty and Dominion over Lands Underlying the Ocean*, 27 Tex. L. Rev. 140 (1948); C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 Tex. L. Rev. 43 (1949).

56. See Patterson, *supra* n. 55, at 50, 55. Modern commentators either do not cite *Dred Scott* or do so apologetically or only in a footnote. See e.g., Brodie, *supra* n. 11, at 718 n. 121; Landever, *supra* n. 10, at 579-83.

57. See *Sweatt v. Painter*, 339 U.S. 629 (1950).

58. 347 U.S. 483 (1954).

59. See *Exec. Or.* 9981, 3 C.F.R. 722 (1943-1948).

Thurmond's decision to run on the segregationist Dixiecrat ticket that year. Was it simply thorough scholarship that led this author to rely on *Dred Scott*, or was there something more going on? State sovereignty over the submerged lands perhaps reinforced broader notions of state sovereignty generally. After all, the author of the last article intones:

[I]t has always been regarded as a foundation policy of developing a Union of states that any territory regardless of the method of acquisition was to be held in trust for statehood since the principle of federalism was to be extended to all territory of the United States . . . any other policy would be a denial of local self-government—the basic principle of the revolution and the foundation of our federalism . . .<sup>60</sup>

The issue of race was frequently characterized as a decision for "local self-government" and not for federal lawmakers.<sup>61</sup>

In this instance, I might be making more out of something than I should. After all, *Dred Scott* was quickly repudiated by the Court, if not explicitly then implicitly. A law professor's invocation of it without apology is perhaps of no moment. Nevertheless, *Dred Scott* presents an instance in which the Court interpreted the Property Clause narrowly to harm a disadvantaged group. Its broad interpretations also have harmed, or can potentially harm, disadvantaged groups.

The first of such groups is the Native Americans. In the brief history that I sketched out earlier I deliberately ignored the implications of the Property Clause on Indians, the first occupants of the lands eventually acquired by the United States. I did so because I wanted to emphasize the notion that the federal lands were a common fund for the United States. In the earliest and crudest sense, the public lands were granted to the United States to pay off a war debt. This notion was later expanded to include a general trust obligation that the United States had over the lands to hold them for the greater good of the citizens of the United States as a whole as opposed to the citizens of a particular state.

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60. Patterson, *supra* n. 55, at 72.

61. I am not trying to depict this author's particular views on the question of segregation or Jim Crow. Despite hours of research, I have been unable to find any definitive statement on his views on these questions one way or the other. I have found, however, that this author was in favor of Germany's entry into the League of Nations, against Roosevelt's court packing plan, a fan of Thomas Jefferson's Constitutional views and limited federal power generally, and the author of a monograph on the history of African Americans in Tennessee. See Caleb Perry Patterson, *The Constitutional Principles of Thomas Jefferson* (U. of Tex. Press 1953); Caleb Perry Patterson, *The Negro in Tennessee, 1790-1865* (U. of Tex. Bull. No. 2205, 1922); Caleb Perry Patterson, *The Admission of Germany to the League of Nations and its Probable Significance*, 231 Int'l Conciliation 303 (1927); *Texan Sees 'A King' by Court Changes*, N.Y. Times, Apr. 13, 1937, at 21 (quoting Patterson describing bill as "unconstitutional in spirit and in fact, if not in law, inadequate if there is a court problem, and dangerous as a precedent").

Against that background, the question of Indian lands is an interesting one. After *Johnson v. M'Intosh*, it is clear that the United States owns the fee interest in Indian lands, subject to aboriginal title and treaty rights.<sup>62</sup> The United States, as legal owner, holds title to millions of acres of land in trust for Indian tribes and individual Indians. If that is the case, then my arguments about the reach of the Property Clause extend to Indians. Congress could legislate to protect Indian lands from external threats just as it could legislate to protect a national park from external threats. But Congress could also use its plenary power over Indian lands to enact legislation that would prove inimical to Indians. One historical example lies in the various statutes that Congress enacted to allot Indian lands to individual Indians and thus destroy reservations. Congress surely had the power to enact those laws to dispose of the property of the United States.

Curiously, however, many influential scholars—including Felix Cohen, one of the greatest scholars of Indian law—have suggested that the relationship of the federal government to lands owned by Indians are not governed by the Property Clause.<sup>63</sup> With all respect to Cohen, I believe he is incorrect. The best textual basis for federal management on Indian lands is the Property Clause. Management of Indian lands is not regulating “Commerce . . . with the Indian tribes,” the language of the Indian Commerce Clause.<sup>64</sup> Rather, it is management of “Property belonging to the United States,” the language of the Property Clause.<sup>65</sup> I believe Cohen suggested that Indian lands were not properly considered public lands or part of the public domain to emphasize the trust aspect of these lands. The United States owns the fee as trustee for the beneficiary Indian tribes and individual tribal members. The trust responsibility of the United States to the Indian tribes and individual Indians provides protection for these interests.

The trust responsibility is not found in the Constitution but was created by the courts.<sup>66</sup> The trust obligation clearly would protect Indian interests over trust property. But a lawsuit to vindicate these interests would take two forms. First, the tribe or individuals could sue in the Court of Federal Claims, in which case they would receive just compensation for the interest taken from them. Second, they could sue in the Court of Federal Claims or

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62. 21 U.S. 543 (1823).

63. Felix S. Cohen, *Handbook of Federal Indian Law*, 209 (Rennard Strickland ed., Michie Co. 1982) (“Indian lands are not ‘public lands’ or part of the ‘public domain,’ or otherwise subject to the public land laws”). Jurist, *supra* n. 36, at 123-27, uses this assertion to support his argument that the protections in ARPA that apply to Indian lands—see 16 U.S.C. §§ 470bb(4)(2000) (defining Indian lands to mean “lands which are held in trust by the United States or subject to a restriction against alienation imposed by the United States”); 16 U.S.C. §§ 470ee(a)(2000) (prohibiting excavation on “Indian lands”)—are not valid as Property Clause legislation. For the reasons stated in the text, I believe this view is mistaken.

64. U.S. Const. art I, § 8, cl. 3.

65. U.S. Const. art. IV, § 3, cl. 2.

66. See Cohen, *supra* n. 63, at 220.

elsewhere for an accounting of trust property.<sup>67</sup> In the end, however, they could not obtain the property itself—just ask the Lakota people about the Black Hills.<sup>68</sup> Just as I suggested earlier that the remedy for a potential taking of private property was cold comfort to the effected landowner, this prospect is really cold comfort to tribes and individual Indians.

The federal government's power over public lands has also been used to thwart Indian interests in public lands. I think a poignant instance is the Supreme Court's 1988 decision, *Lyng v. Northwest Indian Cemetery Protection Association*.<sup>69</sup> The case involved the Forest Service wanting to put in a road that would disturb a traditional area of Indian religious observance. The Court held that the Free Exercise Clause of the First Amendment did not guarantee a right to observe religious practices on federal lands. Although I am not sure whether I disagree with the Court's ultimate holding, its reasoning is unsettling. This discomfort is especially pronounced because the Court chose to add, for no apparent reason, an insensitive sentence in its opinion. "Whatever rights the Indians have to use of the area," wrote the Court, "those rights do not divest the Government of its right to use what is, after all, *its* land."<sup>70</sup> And how, and from whom, exactly, did the United States acquire this land?

Native Americans are not the only community that has suffered from the federal government's exercise of its power under the Property Clause. I can think of two others that have suffered. The first being the members of the Mormon Church. The first case from the Supreme Court which directly rejected the holding of *Dred Scott* was also one which upheld the decision of Congress to disincorporate the Mormon Church.<sup>71</sup> Congress used its powers over the territories to force Utah to accept a ban on polygamy as an immutable part of its state constitution.<sup>72</sup> Although the Mormon Church had foresworn this practice even before Utah's admission to the Union, it was

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67. A rather sprawling accounting case for Indian funds is pending in the United States District Court for the District of Columbia. For a recent sampling of the decisions in this case, see *Cobell v. Norton*, 257 F. Supp. 2d 203 (D.D.C. 2003); *Cobell v. Norton*, 214 F.R.D. 13 (D.D.C. 2003); *Cobell v. Norton*, 237 F. Supp. 2d 71 (D.D.C. 2003). Nevertheless, if the suit were over lands, the tribes or individual Indians likely could not obtain the land back.

68. See Edward Lazarus, *Black Hills/White Justice: The Sioux Nation Versus The United States, 1775 to the Present* (Harper Collins 1991).

69. 485 U.S. 439 (1988).

70. *Id.* at 453.

71. *Church of Jesus Christ of Latter-Day Saints*, 136 U.S. 1.

72. Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107, 108. New Mexico and Arizona have similar conditions on their admissions to the Union. Act of June 10, 1910, ch. 310, §§ 2, 20, 36 Stat. 557, 558, 569. The Supreme Court has held that some conditions placed on states in acts of admission are unconstitutional because they violated the Equal Footing Doctrine. See *Coyle v. Smith*, 221 U.S. 559 (1911)(holding unconstitutional restriction in admission act that prohibited state from relocating state capital). Given that the Supreme Court has more recently held that the governance of marriage laws is one that is within the domain of the states, see *United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 564 (1995)(suggesting that "marriage, divorce, and child custody" are areas "where states historically have been sovereign"), these provisions are probably unconstitutional.

clear from this act—and from the other acts of admission—that Congress was sending a message to a religious group it disliked.

Second, one of the difficult issues that has arisen during the course of this conference is the effect federal land management decisions have on local communities. Professor James Rasband has described the communities dependent on timber, mining, and grazing as the new reservations in the West.<sup>73</sup> Although I do not necessarily agree with this analysis, one implication that has certainly arisen in recent years is the question of the transition of the Old West economy to the New West economy. It is all well and good to say that the economy of the Old West will make a transition from extractive industries such as mining, grazing, and logging to “non-extractive” industries, although other perspectives would question whether these new uses are in fact non-extractive. Make no mistake: I prefer recreational uses of federal lands such as guided rafting trips to extractive uses such as below-cost timber sales. But what about the people who depend on the economy of the “Old West.” The miner in his or her mid-fifties who had a union job probably will not be able to take a job as a rafting guide. He or she will probably end up with a job as a greeter at the local Super Wal-Mart, directing tourists to aisles containing sunscreen or charcoal briquettes.

These observations are not meant to undermine my overall point about federal power over federal property. But if my argument that the federal government has power over private property to protect federal property holds true, then perhaps the federal government could ban that Super Wal-Mart from being within a certain distance of a national park in order to preserve the “visitor experience” of people going to the park. If that result follows, certain communities will completely lose out as a result, with nothing for them in either the old economy based on resource extraction or the new economy based on recreation. My point is not that the federal government lacks power, but that it should use that power wisely and sensitively. In sum, although I have praised the presently underutilized Property Clause power, I can see some of the unsettling implications of that power. The future thus requires two efforts: convincing the federal authorities that they have this power, and convincing them to use it wisely.

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73. James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 *Envtl. L.* 1 (2001).